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Supreme Court

of the

United States

OCTOBER TERM, 1979

NO. 79-654

FRANK J. MERLINO,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

REPLY TO GOVERNMENT'S BRIEF IN OPPOSITION TO THE GRANTING OF CERTIORARI

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ARGUMENT

Petitioner will refrain from repeating any matter set forth in his petition for writ of certiorari and his

supplemental brief to petition for writ of certiorari. Petitioner's reply brief will contain material addressed to the arguments first raised in the government's opposition brief.

Gross Improper Use of the Grand Jury

1. The government concedes that it does not condone the use of compulsory process in order to question a witness about his conversations with defense counsel in a pending case (Gov't Br. 9, 11, 12). Notwithstanding, the government states that there is no suggestion here that the grand jury inquiry was undertaken to ascertain the defense strategy in the present case.

Petitioner will not repeat his argument contained in the questions presented in his petition as to the blatant misuse of a post-indictment grand jury to discover defense stratagem and to prepare for trial.

The boldness of the prosecutor in denying the government's misuse of the post-indictment grand jury for discovery purposes is clearly seen in the following proceedings at the hearing of June 13, 1977:

> "THE COURT: Did you not inquire of a witness [under Grand Jury subpoena] whether or not he had inquired of Mr. Masin [defense counsel] and what the nature of the conversation was?
>
> "MR. PAVE: That is a matter of record.
>
> "THE COURT: That was not discovery?

> "MR. PAVE: That was not discovery in that I did not get anything back. I can certainly talk to a police officer witness whether it be subpoena or derivative.
>
> "THE COURT: About his conversations with defense counsel in a case presently pending?
>
> "MR. PAVE: I think if the witness chooses not to answer he can." (2 SR 17, 18).[1]

It is almost pathetic that a member of the Solicitor General's staff can state to this Court that eliciting answers from a grand jury witness as to what the witness discussed with defense counsel does not result in ascertaining defense strategy (Gov't. Br. 9).

The Solicitor General has traveled a long road in a descending path since a case like *Mesarosh v. United States*, 352 U.S. 1, 77 S.Ct. 1, 1 L.Ed.2d 1 (1956) where the Solicitor General candidly conceded that its chief witness had perjured himself in other cases.

Petitioner has accused the prosecutor with making false representations to the trial court that the post-indictment grand jury was not used for any discovery and that no *Brady* material existed. Petitioner has used exceptionally strong but appropriate language that justice has been perverted by the prosecutor's misuse of the grand jury and "lied to cover up this misconduct". The Solicitor General of the United States never even replied to these serious charges. Instead, the Solicitor

[1]Reference to the second supplement to the record-on-appeal will be by the use of the symbol "2 SR".

General attempted to avoid the charges and confuse this Court by stating the following in a footnote:

> "Petitioner also argues (Pet. 8) that there was prosecutorial misconduct in what he labels as a misrepresentation by the government as to the content of certain tapes of conversations between Cacy and others. However, as the magistrate, the district court, and the court of appeals found (Pet.App. A-4 to A-5), the prosecutor had relied on representations made by others and did not intentionally misrepresent the contents of these tapes. In any event, those portions that contained conversations referring to petitioner were turned over to petitioner in advance of trial, and there was therefore no prejudice to petitioner." (Gov't Br. 11)

This footnote concerning the Magistrate's finding that the prosecutor relied on patently false statements that there was no information favorable to the petitioner concerning certain *in camera* material but that the prosecutor did not himself thwart the process of the Court was made by the Magistrate on *April 15, 1977,* at an evidentiary hearing (SR 115).[2]

The magistrate's finding on *June 13, 1977,* that the prosecutor made "repeated representations to the Court that have been false in this case . . ." refers not to the

[2]Reference to the first supplement to the record-on-appeal will be by the use of the symbol "SR".

prosecutor's reliance on others but refers to the false representations knowingly made by the prosecutor (2 SR 21).

This finding of the Magistrate that the prosecutor lied to the trial court was based on the prosecutor's misrepresentations concerning matters of which he had personal knowledge. During a hearing before the District Judge on January 28, 1977, it was revealed that the government had subpoenaed many of the same persons that had been subpoenaed by the defendant to appear before a Federal grand jury on the morning of January 28, 1977 (R 149, 150).[3] On the *same day* the prosecutor deliberately misrepresented to the District Judge and employed deceptive tactics concerning the government's purpose in using the (post-indictment) grand jury and the information gained by the government from the witness' testimony.

The misrepresentations are as follows:

1. The prosecutor told the District Judge that the grand jury was not used for any discovery (R 155-156).

2. The grand jury was called to determine whether there was any wrongdoing in the police officers' handling of the case and whether there was any further *Brady* material that should be furnished to defense counsel (R 155).

Both the Magistrate and the District Judge *found* that the government improperly used the grand jury to

[3]Reference to the record-on-appeal will be by the use of the symbol "R".

discover testimony of witnesses subpoenaed by the defendant and *Brady* material was revealed which should have been furnished to the defendant (R 284, 294-296). The District Judge found that the grand jury was improperly used to prepare an indictment for trial (T 284). Both the District Judge and the Magistrate found that there was material in the transcripts of the grand jury containing *Brady* material that should have been furnished to the defendant (R 284, 294-296).

Quite simply, this Court must exercise its supervisory powers to indicate to all Federal prosecutors that the criminal justice system will not tolerate deliberate misrepresentations to a District Judge or to a United States Magistrate.[4]

This Court should accept jurisdiction in order to set minimum standards for the conduct of Federal prosecutors. These minimum standards should include, *inter alia,* that deliberate false representations to a trial court judge on a material matter will result in the grant of a new trial or the dismissal of an indictment depending on the flagrancy of the prosecutorial perfidy.

This Court must set a minimum standard for federal prosecutors which prohibits use of a post-indictment grand jury to subpoena witnesses to prepare the government's case for trial.

[4]It is perplexing to understand from all of the foregoing how the trial judge could make the statement half-way through the trial that the government had tried the case in good faith and that the government did not knowingly and intentionally deprive the defendant of any of his rights (T 656, 657, 662, 663).

Although our system of law may be the best in civilized society, it has its inherent defects for it is ministered through men. The frailties of men are reflected so clearly in this case which frailties resulted in the abuses perpetrated by the prosecutor that only this Court can correct.

Prosecutorial misconduct is so commonplace in regard to the oft-repeated suppression of *Brady, Giglio* and Jencks materials that it will continue unabated unless this Court exercises its role to supervise Federal courts. Thus minimum standards must be set to require prosecutors to comply with the well-established rules relating to the production of *Brady, Giglio* and Jencks material.

Accordingly, the writ should be granted.

Suppression of the Jencks Material

2. As to the government's failure to make Agent Fernandez' grand jury testimony available to the defense at trial as required by the Jencks Act, the government states it does not condone such carelessness of the prosecution (Gov't Br. 11). The government concludes, however, that the petitioner was not prejudiced by not having access to Fernandez' testimony at the time of trial. According to the Solicitor General there was no prejudice for the following reason:

> "Petitioner, who was also furnished with a copy of the transcript (ibid), likewise has not pointed to any inconsistency between Fernandez's trial testimony and the grand jury

testimony that he might have been able to exploit had the latter been available to him at trial. In the absence of any colorable showing of potential prejudice, petitioner is not entitled to relief." (Gov't Br. 6).

To the contrary there is a substantial inconsistency between the grand jury testimony of Fernandez and the latter's trial testimony. Notwithstanding the Fifth Circuit's finding that a comparison of Agent Fernandez' testimony at trial and his grand jury testimony reveal no " 'substantial inconsistency, contradiction or variation' " in the testimony given on the two occasions, the Fifth Circuit panel at oral argument indicated differently. For Judge Thornberry noted that the grand jury testimony of Fernandez was more incriminating than the testimony of Fernandez before the jury.[5]

Adverting to Fernandez' grand jury testimony, he stated:

> "We again met at Lum's and he *[Merlino] had placed half a pound of cocaine wrapped in newspaper behind a Dempsey Dumpster* and that was about it." (Grand Jury Testimony of 4/1/76; pp. 4, 5). (Emphasis added).

[5]Inasmuch as Fernandez' testimony was apparently unimpeachable during the trial, the oportunity to show that Fernandez substantially colored his testimony before the grand jury (to obtain an indictment) would have had a significant impact on the jurors who deliberated for seven hours as will be shown, *infra*.

On the other hand, in regard to the critical issue of who placed the cocaine behind the Dempsey Dumpster, Fernandez at trial stated:

> " . . . he then told me—motioned over his shoulder and asked me if I saw a green garbage can.
>
> "I looked and there was a big square Dempsey Dumpster. I said 'Yeah, the Dempsey Dumpster'.
>
> "He replied, 'Yeah, Yeah', and then he told—he said 'it's behind the Dempsey Dumpster, in the newspaper."
>
> (T 608)[6]

Neither Fernandez nor any agent saw Merlino place any cocaine behind the Dempsey Dumpster (T 608, 739-743).

Without citing the pages at which the trial judge commended the excellence of Mr. Masin, petitioner's trial counsel, in his cross-examination of Cacy, it is patently evident that Mr. Masin would have been able to effectively impeach Fernandez by asking him whether he had told the grand jurors that Merlino had placed one-half pound of cocaine behind the Dempsey Dumpster.

[6]Reference to the transcript of the trial proceedings will be by the use of the symbol "T".

Masin could have shown this grand jury statement to be a boldface misrepresentation by Fernandez.[7]

Further, had the grand jury transcript been produced during trial when ordered by the trial judge, defense counsel could have seriously questioned Fernandez' ability of recall, as the latter testified at the beginning of his cross-examination that he did not even remember appearing before the Federal grand jury (T 617). Fernandez' faulty memory could have been properly capitalized upon for he testified further that even with a subpoena to appear before the grand jury, he could not remember appearing before the grand jury (T 617).

Suppression of *Brady* Material

3. The government contends that no actual prejudice occurred as a result of the prosecutor's failure to furnish a statement of a conversation between Fernandez and the petitioner clearly containing *Brady* material indicating that the petitioner did not want to talk about cocaine (Gov't Br. 6, 7). The government contends that no actual prejudice resulted and the Court of Appeals (Fifth Circuit) agrees in this contention. Id. at page 7.

Petitioner would respond that the blatant suppression of the *Brady* material denied him a fair opportunity to prepare an entrapment defense. During

[7]Defense counsel could have inquired of Agent Fernandez whether the misrepresentations before the grand jury that he (Merlino) placed the cocaine behind the dumpster was more likely to achieve the result of obtaining an indictment.

cross-examination of the case agent, Fernandez it was elicited by chance that he had made a certain report (T 642-644). Thereupon, a two-page report by Fernandez was examined by the District Judge. Upon examination of the report he declared it to be *Brady* material. The first page of this report was found by the District Judge to be helpful to the defense where special agent Fernandez attempted to get defendant into a narcotics deal and the defendant indicated that he was not interested (T 647).

Obviously, this evidence that the defendant desired not to be involved in a drug deal would constitute evidence supporting the defense of entrapment.

The defense of entrapment is still viable in the laws of the United States and is considered a complete defense when properly asserted. *Hampton v. United States,* 425 U.S. 484, 48 L.Ed.2d 113, 96 S.Ct. 1646 (1976); *United States v. Russell,* 411 U.S. 423, 36 L.Ed.2d 366, 93 S.Ct. 1637.

It is submitted that the government knowingly and wilfully withheld this exculpatory evidence or was grossly negligent as evidenced by the prosecutor's inability to explain why the report was not provided to defense counsel (T 651, 652).

From a review of all the evidence in the case, the specific information in the report as well as the overwhelming amount of governmental misconduct, it can be seen.

1) That the report was clearly *Brady* material.

2) Had it been timely provided under the standing discovery order, a serious and well-founded entrapment defense could have been prepared and,

3) By withholding the information, the government denied the petitioner the opportunity to consider and prepare such a defense.

Clearly, the suppressed *Brady* material constituted a crucial, critical and highly significant piece of evidence which was directly material to the petitioner's guilt or innocence. As such, this act alone by the government, coming without explanation, has a serious bearing on the fundamental fairness of the trial.

Thus, it is apparent that the misconduct of the government resulted in prejudice to the petitioner, denying him Due Process of Law under the Fifth Amendment and the right to effective assistance of counsel under the Sixth Amendment.

Intracircuit Conflict

4. Concerning the intracircuit conflict between the case *sub judice* and *United States v. Hammond,* 598 F.2d 1008 (5th Cir. 1979), and the decision on petition for rehearing in *United States v. Hammond,* not as yet reported,[8] the issues involved in the intracircuit conflict are clearly set forth in the petition and supplemental brief. Petitioner responds to the government argument that an intracircuit conflict is not ordinarily the basis for

[8]The opinion on petition for rehearing is contained in the supplemental appendix in the supplemental brief to petition for writ of certiorari.

review by this Court, *Wisniewski v. United States,* 353 U.S. 901 (1957).

The alleged intracircuit conflict was of sufficient importance that the Fifth Circuit through its Clerk notified the Clerk of this Court of the Fifth Circuit's opinion on rehearing in the *Hammond* case.[9]

This Court has taken jurisdiction when the intracircuit conflict relates to a recurring and important issue or is accompanied by "widespread conflict among the circuits," *Commissioner v. Estate of Bosch,* 387 U.S. 456, 457, it may become one of the factors inducing the Court to grant certiorari. See, *e.g., John Hancock Ins. Co. v. Bartels,* 308 U.S. 180, 181 (certiorari granted because of intracircuit conflict and the importance of the question); *Dickinson v. Petroleum Conversion Corp.,* 338 U.S. 507, 508 (certiorari granted "because of this intracircuit conflict"); *Maggio v. Zeitz,* 333 U.S. 56, 59-60 (certiorari granted because of differing views within a circuit that was most frequently confronted with difficult bankruptcy problems); *Scarborough v. United States,* 431 U.S. 563, 567, n. 4 (certiorari granted because of "split among the Circuits," one Circuit being noted as having an intracircuit conflict).

A remand for an en banc hearing may also be appropriate in dealing with an intracircuit conflict. After granting a second petition for rehearing of an order denying certiorari, this Court remanded a criminal case to the Ninth Circuit with leave to apply for an en banc hearing before that court "[i]n view of the conflict of

[9]The contents of the Fifth Circuit's letter are set forth in the supplemental brief at page 2.

views which has arisen among the judges of the Ninth Circuit with respect to the decision in this case," and in view of a recent Supreme Court decision in another case. *United States ex rel. Robinson v. Johnston,* 316 U.S. 649, 86 L.Ed. 1732.

CONCLUSION

This Court should issue a writ of certiorari to review the judgment and opinion of the Fifth Circuit or, in the alternative, remand the case for an en banc hearing to compel the Fifth Circuit to comply with Rule 35 of the Federal Rules of Appellate Procedure in order that the Circuit maintain uniformity of its decisions.

Respectfully submitted,

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